

FLOYD JACKSON,

Petitioner,

V.

SHAWN HATTON, Warden,

Respondent.

Case No. 17-cv-04254-JST (PR)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
GRANTING CERTIFICATE OF
APPEALABILITY**

Before the Court is the above-titled petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 by petitioner Floyd Jackson, challenging the validity of a judgment obtained against him in state court. Respondent has filed an answer to the petition.¹ Petitioner has not filed a traverse, and the time in which to do so has passed. For the reasons set forth below, the petition is denied.

I. PROCEDURAL HISTORY

On December 19, 2011, an Alameda County jury convicted petitioner of attempted murder, and found true allegations that he: (1) personally and intentionally discharged a firearm causing great bodily injury, and (2) was a felon in possession of a firearm. Clerk's Transcript² ("CT") at 325-26, 456-57. Petitioner admitted three prior convictions for which he had served prison terms, including one strike prior. Reporter's Transcript³ ("RT") at 501-02. Petitioner was sentenced to 50 years and four months to life in state prison. CT 336; RT 514-15.

¹ William Muniz, the previous warden of Salinas Valley State Prison, where petitioner is incarcerated, was originally named as the respondent in this action. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Shawn Hatton, the current warden of Salinas Valley State Prison, is hereby SUBSTITUTED as respondent in place of petitioner's prior custodian.

² The Clerk's Transcript is docketed at ECF No. 14-1.

³ The Reporter's Transcript is docketed at ECF No. 14-2.

1 On October 29, 2013, the California Court of Appeal affirmed the judgment of conviction.
2 Ex. 6.⁴ On January 15, 2014, the California Supreme Court denied review. Ex. 8. Petitioner filed
3 a habeas petition in the Alameda County Superior Court, which was denied in a reasoned ruling on
4 the merits on February 27, 2015. Ex. 9. Petitioner then filed a habeas petition in the California
5 Court of Appeal, which was summarily denied on November 24, 2015.⁵ Petitioner then filed a
6 habeas petition in the California Supreme Court, which was summarily denied on July 20, 2016.
7 Exs. 10-11. The instant action was filed on July 26, 2017.

8 **II. STATEMENT OF FACTS**

9 The following summary describing the crime and evidence presented at trial is from the
10 opinion of the California Court of Appeal:⁶

11 In the early morning hours of September 10, 2011, Angelique Payton was asleep in her
12 home with appellant, her then boyfriend. [FN 2]. Around 6:00 a.m., Payton's ex-
13 boyfriend, Torrance Mackey, woke her by throwing rocks at her bedroom window. Payton
14 told appellant to let her talk to Mackey, but appellant pushed her out of the way and left the
15 bedroom. Payton saw a gun in appellant's pocket as he left.

16 [FN 2]: Payton did not testify at trial, but her testimony from the preliminary
17 hearing was read into the record.

18 Payton's son, Raymon Hill, was awakened around 6:00 a.m. that morning by the sound of
19 Payton and appellant arguing in Payton's bedroom. [FN 3]. He heard a gun "cocked" and
20 then saw appellant leave Payton's bedroom with a gun in his hand. Watching from inside
21 the front door, Hill saw appellant and Mackey talking for about five minutes. He heard
22 Mackey ask appellant, "You going to bust me?" which Hill understood to mean "You
23 gonna shoot me?" Hill could not hear appellant's response. Mackey turned around and
24 began to walk toward his vehicle. Hill then closed the front door and began to walk

25 ⁴ All references herein to exhibits are to the exhibits submitted by respondent in support of the
26 answer, unless otherwise indicated.

27 ⁵ See California appellate courts on-line register of actions at
28 http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2105581&doc_no=A144752&request_token=NiIwLSIkXkw2W1BNSCNdTEtJUFQ6UVxfJyNeWz9TUCAgCg%3D%3D

29 ⁶ The Court has independently reviewed the record as required by AEDPA. *Nasby v. McDaniel*,
30 853 F.3d 1049, 1055 (9th Cir. 2017). Based on the Court's independent review, the Court finds
31 that it can reasonably conclude that the state court's summary of facts is supported by the record
32 and that this summary is therefore entitled to a presumption of correctness, unless otherwise
33 indicated in this order. *Hernandez v. Small*, 282 F.3d 1132, 1135 n.1 (9th Cir. 2002); 28 U.S.C.
34 § 2254(e)(1).

1 upstairs; while he was on the stairs, he heard gunshots. He ran outside and saw Mackey
2 lying on his stomach under his vehicle. Appellant was gone.
3

4 [FN 3]: Hill did not testify at trial, but his testimony from the preliminary hearing
5 was read into the record.
6

7 Mackey testified that he got into an argument after appearing at Payton's house on the
8 morning in question. Mackey did not have a weapon with him. He did not recognize
9 appellant as the man with whom he argued, and did not remember many details about the
10 argument because he "kind of blacked out." However, he did remember getting shot from
11 behind as he was walking towards his car.
12

13 A crime scene investigator and expert in firearm trajectory found seven cartridge casings at
14 the scene of the shooting. He also found six "bullet strikes" in the asphalt near Mackey's
15 vehicle—indentations indicating a bullet had hit the street at that location. There was no
16 evidence that more than one shooter had been involved in the shooting.
17

18 The doctor who initially treated Mackey found five "missile" wounds: "through and
19 through" injuries to his shoulder, arm, and thigh; and wounds on his buttocks and his knee.
20 Bullets or bullet fragments were found above Mackey's knee and in his thigh. The doctor
21 could not tell whether the buttocks wound was caused by a bullet or something else.
22

23 Appellant did not testify or present any other witness in his defense.
24

25 *People v. Jackson*, No. A134869, 2013 WL 5806023, at *1-2 (Cal. Ct. App. Oct. 29, 2013).
26

27 III. DISCUSSION

28 A. Standard of Review

1 A petition for a writ of habeas corpus is governed by the Antiterrorism and Effective Death
2 Penalty Act of 1996 ("AEDPA"). This Court may entertain a petition for a writ of habeas corpus
3 "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that
4 he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.
5 § 2254(a).
6

7 A district court may not grant a petition challenging a state conviction or sentence on the
8 basis of a claim that was reviewed on the merits in state court unless the state courts' adjudication
9 of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable
10 application of, clearly established Federal law, as determined by the Supreme Court of the United
11 States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in
12 light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v.*
13

1 *Taylor*, 529 U.S. 362, 412-13 (2000). Additionally, habeas relief is warranted only if the
2 constitutional error at issue ““had substantial and injurious effect or influence in determining the
3 jury’s verdict.”” *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (quoting *Brecht v. Abrahamson*, 507
4 U.S. 619, 637 (1993)).

5 A state court decision is “contrary to” clearly established Supreme Court precedent if it
6 “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases,” or if it
7 “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]
8 Court and nevertheless arrives at a result different from [its] precedent.” *Williams*, 529 U.S. at
9 405-06. “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if
10 the state court identifies the correct governing legal principle from [the Supreme] Court’s
11 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413.
12 “[A] federal habeas court may not issue the writ simply because that court concludes in its
13 independent judgment that the relevant state-court decision applied clearly established federal law
14 erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

15 Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court’s
16 jurisprudence. “[C]learly established Federal law, as determined by the Supreme Court of the
17 United States,” refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions
18 as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412. “A federal court
19 may not overrule a state court for simply holding a view different from its own, when the
20 precedent from [the Supreme Court] is, at best, ambiguous.” *Mitchell v. Esparza*, 540 U.S. 12, 17
21 (2003).

22 The Supreme Court has repeatedly affirmed that under AEDPA, there is a heightened level
23 of deference a federal habeas court must give to state court decisions. *See Hardy v. Cross*, 565
24 U.S. 65, 66 (2011) (per curiam); *Harrington v. Richter*, 562 U.S. 86, 103-04 (2011); *Felkner v.*
25 *Jackson*, 562 U.S. 594, 598 (2011) (per curiam). As the Court explained: “[o]n federal habeas
26 review, AEDPA ‘imposes a highly deferential standard for evaluating state-court rulings’ and
27 ‘demands that state-court decisions be given the benefit of the doubt.’” *Felkner*, 562 U.S. at 598
28 (citation omitted). With these principles in mind regarding the standard and limited scope of

1 review in which this Court may engage in federal habeas proceedings, the Court turns to
2 petitioner's claims.

3 **B. Petitioner's Claims**

4 Petitioner asserts the following grounds for relief: (1) trial counsel rendered ineffective
5 assistance by failing to adequately argue to the jury that petitioner was guilty of assault with a
6 firearm, a lesser-included offense of attempted murder, and (2) trial counsel rendered ineffective
7 assistance by failing to present expert testimony on the ballistics evidence. The Court addresses
8 these claims in turn.

9 **1. State Court Opinion**

10 The Alameda County Superior Court, on state habeas, was the last state court to have
11 reviewed the claims in a reasoned decision, and it is that court's decision that this Court reviews
12 herein. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d 1085,
13 1091-92 (9th Cir. 2005). The Alameda County Superior Court ruled, in relevant part, as follows:

14 Petitioner claims that he was denied . . . his right to effective assistance of counsel based
15 on two factual claims: (1) trial counsel could and should have argued more effectively for
16 the offense of assault with a firearm based on the ballistic evidence; and (2) trial counsel
17 failed to consult with a ballistic expert to learn whether the ballistic evidence supported the
18 defense theory. Petitioner alleges that he was prejudiced by his trial attorney's failures to
19 argue the assault with the firearm instruction, to consult with a ballistic expert, and to
20 present the expert's testimony about the ballistic evidence, which would have casted
21 reasonable doubt as to whether Petitioner intended to kill the victim, as opposed to
22 intending to frighten, intimidate, humiliate, or wound the victim with the seven shots fired.

23 The petition fails to state [a] *prima facie* case for relief. Petitioner has not established
24 ineffective assistance of [counsel]. To establish ineffective assistance of counsel under
25 either the federal or state guarantee, a defendant must show that counsel's representation
26 fell below an objective standard of reasonableness under prevailing professional norms,
27 and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability
28 exists that, but for counsel's failings, the result would have been more favorable to the
defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239 (*Resendiz*), abrogated
on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356.) In assessing the
reasonableness of counsel's performance, "[j]udicial scrutiny of counsel's performance
must be highly deferential. It is all too tempting for a defendant to second-guess counsel's
assistance after conviction or adverse sentence, and it is all too easy for a court, examining
counsel's defense after it has proved unsuccessful, to conclude that a particular act or
omission of counsel was unreasonable." (*Strickland v. Washington* (1984) 466 U.S. 668,
689 (*Strickland*).) "Surmounting *Strickland*'s high bar is never an easy task." (*Padilla*,
supra, 559 U.S. at p. 371.) "The *Strickland* standard must be applied with [']scrupulous
care.[']" (*Cullen v. Pinholster* (2011) 563 U.S. —, —, 131 S. Ct. 1388, 1408.)

Petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*Strickland, supra*, 466 U.S. 668, 694.) “If it is easier to dispose of an ineffective assistance claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.) That assessment must be made in light of the totality of the evidence before the trier of fact. (*Strickland, supra*, at 695.) (*Strickland, supra*, 466 U.S. at p. 694.)

As to the first claim, Petitioner’s ineffective assistance of counsel claim is based on the argument that trial counsel did not specifically argue that the jury could infer lack of intent to kill based on the physical evidence that six of the seven shot[s] left “strike marks” on the pavement between where the victim was found by the police and where the shooter was probably standing. However, Petitioner’s trial counsel did argue, in addition to pointing out inconsistency in the doctor’s testimony regarding the victim’s injuries, that the evidence supported an assault rather than attempted murder, and argued many facts in support of a the [sic] assault instead of the attempted murder conviction. Thus, Petitioner has not established that trial counsel’s closing argument was deficient. (*Cf. People v. Diggs* (1986) 177 Cal.App.3d 958, 970; *People v. Moore* (1988) 201 Cal. App. 3d 51, 57.) Further, Petitioner also fails to establish prejudice given the amount of evidence of guilt of attempted murder. Therefore, petitioner has not made a *prima facie* case for relief on the first claim for ineffective assistance of counsel.

As to the second claim, Petitioner again fails [to] establish prejudice. Given the totality of the evidence at trial, including that the shooter shot at the victim seven times, it cannot be said that it is reasonable [sic] probable that the testimony and opinion of Mr. Grewal⁷, assuming all of these were admissible, would have resulted in a different result other than the attempted murder conviction. Consequently, Petitioner has failed to establish a *prima facie* case on the second claim of ineffective assistance of counsel.

Ex. 9.

2. Legal Standard for Ineffective Assistance of Counsel Claims

Claims of ineffective assistance of counsel are examined under *Strickland v. Washington*, 466 U.S. 668 (1984). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686. In order to prevail on a claim of ineffectiveness of counsel, a petitioner must establish two factors. First, he must establish that counsel’s performance was deficient, i.e., that it fell below an “objective standard of reasonableness” under prevailing professional norms, *id.* at 687-88, “not whether it deviated from

⁷ As discussed below in connection with petitioner’s second claim, Dr. Grewal is a ballistics expert who submitted a report supporting petitioner’s state habeas petition.

1 best practices or most common custom,” *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing
2 *Strickland*, 466 U.S. at 690). “A court considering a claim of ineffective assistance must apply a
3 ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable
4 professional assistance.” *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689).

5 Second, he must establish that he was prejudiced by counsel’s deficient performance, i.e.,
6 that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
7 proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is a
8 probability sufficient to undermine confidence in the outcome. *Id.* “The likelihood of a different
9 result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 112 (citing *Strickland*, 466
10 U.S. at 693). It is unnecessary for a federal court considering an ineffective assistance of counsel
11 claim on habeas review to address the prejudice prong, i.e., the second factor of the *Strickland* test,
12 if the petitioner cannot establish incompetence, as required under the first prong. *Siripongs v.*
13 *Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).

14 The standards of both 28 U.S.C. § 2254(d) and *Strickland* are “highly deferential, and
15 when the two apply in tandem, review is doubly so.” *Richter*, 562 U.S. at 105 (internal quotation
16 marks and citations omitted). “[T]he question [under § 2254(d)] is not whether counsel’s actions
17 were reasonable. The question is whether there is any reasonable argument that counsel satisfied
18 *Strickland*’s deferential standard.” *Id.*

19 **3. Counsel’s Closing Argument**

20 Petitioner claims that trial counsel rendered ineffective assistance by failing to adequately
21 argue to the jury that petitioner was guilty of assault with a firearm rather than attempted murder.
22 ECF No. 1 at 5, 7, 45-53. In addition to raising the claim on state habeas, petitioner raised this
23 claim on direct appeal. The California Court of Appeal issued a decision on the claim as follows:

24 The thrust of trial counsel’s closing argument was the prosecution had not proved intent to
25 kill. He portrayed Mackey as the aggressor and argued appellant was simply reacting,
26 perhaps thinking Mackey had a weapon. Trial counsel argued the evidence showed
27 Mackey was neither shot in the back nor shot while lying on the ground. This evidence,
28 trial counsel suggested, was inconsistent with attempted murder: “Face-to-face, not with
my back to you. And if you know nothing else, that’s all you need to decide this case one
way or the other. Was it an attempt to kill somebody who is apparently laying helpless on
the ground and I walk away from you or is this an assault? And those are the choices

1 you're going to have to make. Is this an assault or is this an attempted murder?"

2 Appellant argues trial counsel's closing statement was ineffective because it did not
3 formulate an argument based on certain ballistics evidence. According to appellant, trial
4 counsel should have argued the six bullet strikes found on the street could only be the
5 result of a gun fired directly at the ground because (1) only seven casings were found and
6 therefore only seven bullets were fired; (2) the bullets either remained in Mackey's body
7 and therefore did not subsequently strike the ground, or hit his upper body and therefore
8 were not likely to then strike the ground nearby; and (3) any bullets fired at Mackey while
9 he was lying down would likely have remained under his body and no such bullets were
10 found. Appellant contends counsel should have argued this evidence shows Mackey's
11 wounds resulted from bullets ricocheting off the ground and therefore appellant had no
12 intent to kill.

13 The California Supreme Court has "repeatedly stressed 'that "[if] the record on appeal
14 sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless
15 counsel was asked for an explanation and failed to provide one, or unless there simply
16 could be no satisfactory explanation," the claim on appeal must be rejected.' [Citation.] A
17 claim of ineffective assistance in such a case is more appropriately decided in a habeas
18 corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-
19 267.) "[D]eference to counsel's tactical decisions in his closing presentation is particularly
20 important because of the broad range of legitimate defense strategy at that stage.... Judicial
21 review of a defense attorney's summation is therefore highly deferential...." (*Yarborough*
22 v. *Gentry* (2003) 540 U.S. 1, 6 (*Yarborough*).)

23 Appellant's trial counsel was not asked to explain why in his closing statement he did not
24 make the above argument. We cannot say there could be no satisfactory explanation. Trial
25 counsel may have considered the argument posited by appellant and concluded it was weak
26 or would confuse the jury. "When counsel focuses on some issues to the exclusion of
27 others, there is a strong presumption that he did so for tactical reasons rather than through
28 sheer neglect." (*Yarborough, supra*, 540 U.S. at p. 8.) Accordingly, we reject appellant's
claim.

19 *People v. Jackson*, 2013 WL 5806023, at *2-3 (footnote omitted).

20 This excerpt is given only for background. This Court does not evaluate the
21 reasonableness of the court of appeal's opinion for two reasons. First, the Alameda County
22 Superior Court's decision on state habeas came after the ruling on direct appeal, making the
23 superior court's decision the last reasoned ruling. *See Ylst*, 501 U.S. at 803-04. Second the
24 California Court of Appeal did not reach the claim "on the merits," but rather rejected the claim on
25 the state procedural ground that ineffective assistance of counsel claims must be rejected on direct
26 appeal where the record on appeal is silent as to counsel's reasons for the challenged course of
27 action. Section 2254(d) only applies when the claim was "adjudicated on the merits" in state
28

1 court. Where the state courts do not reach the merits of the petitioner’s constitutional claim,
2 federal habeas review is not subject to the deferential standard that applies under AEDPA. *Cone*
3 *v. Bell*, 556 U.S. 449, 472 (2009).

4 On state habeas, the California Court of Appeal and California Supreme Court summarily
5 denied petitioner’s state habeas petitions. This court “look[s] through the unexplained decision[s]
6 to the last related state-court decision that does provide a relevant rationale” and then “presume[s]
7 that the unexplained decision[s] adopted the same reasoning.” *Wilson v. Sellers*, 138 S. Ct. 1188,
8 1192 (2018). Consequently, it is the opinion of the superior court on state habeas, excerpted
9 above, that this Court reviews for reasonableness.

10 Based on a review of the record, the state court’s rejection of this claim was not contrary
11 to, and did not involve an unreasonable application of, Supreme Court precedent, and was not
12 based on an unreasonable determination of the facts in light of the evidence presented in the state
13 court proceeding. 28 U.S.C. § 2254(d). Notably, counsel secured an instruction on assault with a
14 firearm as a lesser-included offense of attempted murder over the prosecution’s objection. RT at
15 447-52. Further, both during his questioning of witnesses and in his closing argument, defense
16 counsel highlighted how the evidence did not support the prosecutor’s theory of attempted murder
17 and was more consistent with assault with a firearm.

18 Specifically, through defense counsel’s cross-examination of police crime scene
19 investigator Zachary Dexter, defense counsel clarified that if petitioner had stood over Mackey
20 while he shot him six or seven times, one would expect six or seven bullet holes in Mackey’s
21 back, and would expect the bullets to either be retained in Mackey’s body or, if they traveled
22 through his body, be on the ground under his body. RT at 256-57. During closing argument,
23 defense counsel highlighted the significance of this evidence as follows: “I asked Officer Dexter,
24 the person was laying on the ground and I stood over and shot him in the back, you would expect
25 the bullet to either remain in the body or be right under the body. That wasn’t the case. You’re
26 asked to find attempted murder of a person that was shot in the back. It isn’t there.” RT at 412.
27 Defense counsel also pointed out that Dr. Celada was unaware of the cause of certain of Mackey’s
28 injuries. RT at 416-17.

1 Defense counsel further argued that the evidence did not support a finding of attempted
2 murder because petitioner had a conversation with Mackey before firing the shots, and because
3 petitioner had the opportunity to shoot Mackey while he was helplessly lying on the ground but
4 did not do so. Specifically, he argued, “If this was attempted murder, I don’t hold a five-minute
5 conversation with you.” RT 415. Counsel proceeded, “Do I stand over you while you’re down on
6 the ground and shoot you? No.” RT 415-16. Finally, defense counsel argued that the evidence
7 did not support the theory that petitioner had continued to shoot Mackey once Mackey was lying
8 on the ground. RT 417. As noted by the court of appeal, defense counsel argued, “Was it an
9 attempt to kill somebody who is apparently laying helpless on the ground and I walk away from
10 you or is this an assault? And those are the choices you’re going to have to make. Is this an
11 assault or is this an attempted murder?” RT at 417.

12 It is certainly true that counsel could have brought more of the ballistics evidence into his
13 argument for assault. However, given the number of shots fired and the several wounds suffered
14 by Mackey, counsel may have made a valid tactical decision to avoid focusing on the ballistics
15 evidence. *See Richter*, 562 U.S. at 109 (“There is a strong presumption that counsel’s attention to
16 certain issues to the exclusion of others reflects trial tactics rather than sheer neglect.”). In sum, it
17 cannot be said that counsel’s performance fell below an objective standard of reasonableness.
18 *Strickland*, 466 U.S. at 688. At a minimum, this Court cannot say the state court was
19 unreasonable in so finding. *Richter*, 562 U.S. at 105.

20 **4. Counsel’s Failure to Consult a Ballistics Expert**

21 Petitioner claims that trial counsel rendered ineffective assistance by not consulting with a
22 ballistics expert. ECF No. 1 at 5, 55. Petitioner attaches to his petition a report prepared by Dr.
23 Devinder Grewal, “a mechanical engineer providing accident reconstruction, failure analysis,
24 engineering design, and laboratory/field testing services.” ECF No. 1 at 73. Dr. Grewal was
25 retained by petitioner’s counsel during his state habeas proceedings. *See id.* After reviewing the
26 evidence in the case, Dr. Grewal issued a report making the following conclusions:

27 (1) Six of the seven shots were fired downward toward the ground. The remaining shot
28 could have been fired either into the ground or toward the truck.

(2) The tight grouping of five of the seven shots (as shown by the strike marks on the pavement), indicated that the shooter was at a close distance and aimed the gun at the ground.

(3) Given the close distance and tight aim of the shots, the shooter likely had the ability to aim and fire his shots at a different place on Mackey's body—for example, the torso or head—creating more fatal wounds than the ones actually inflicted. *Id.* at 78.

Based on a review of the record, and applying the standard for ineffective assistance of counsel claims outlined above, the state court's rejection of this claim was not contrary to, and did not involve an unreasonable application of, Supreme Court precedent, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). First, as noted above, counsel could have made a reasonable tactical decision not to focus on the ballistics evidence given the number of shots fired and given the severity of Mackey's injuries. A ballistics expert would also have highlighted the fact that all seven shots came from the same firearm—a fact that had been established but was not presented to the jury due to the police department's failure to deliver the information to the prosecution before trial. *See* RT at 309-14. Further, to the extent the defense did rely on ballistics evidence, it was not unreasonable to use the prosecution's witnesses for this purpose. Evidence was presented at trial by the emergency room physician, Dr. Roberto Celada, and the police crime scene investigator, Zachary Dexter, suggesting the possibility that most of the wounds were caused by bullets that were not fired at the victim but at the pavement and ricocheted up to hit him. Dr. Celada testified that when Mackey first came to the hospital after the shooting, he was breathing and alert, and his blood pressure and pulse indicated he had not lost a lot of blood. RT at 291-92. Dr. Celada also testified that the knee injury could have been the result of a ricochet, RT at 294-95, and the femur injury could have been caused by a piece of asphalt, RT at 305. Most importantly, Dexter testified that he found 7 cartridge casings by the side of the street and 6 "strike marks" on the asphalt pavement and asphalt debris on the victim's truck, showing that 6 of the shots likely first hit the pavement. RT at 197, 233, 241-42, 245-46. Dexter also opined on the location of the shooter. RT at 233, 246-47. Finally, as noted above, on cross-examination Dexter testified that if the shooting victim had been lying on the ground when shot, either the bullets

1 would be found lodged in his body or on the ground where he had been lying. RT at 256-57.
2 Dexter had training and experience in gunshot trajectory and shooting reconstruction. RT at 168-
3 73, 215-16.

4 While it is certainly true that counsel could have bolstered the ballistics evidence by
5 obtaining an outside expert, it cannot be said that counsel's decision to rely on the prosecution's
6 witnesses and/or downplay the ballistics evidence fell below an objective standard of
7 reasonableness. *Strickland*, 466 U.S. at 688. At a minimum, this Court cannot say the state court
8 was unreasonable in rejecting this claim. *Richter*, 562 U.S. at 105.

9 **5. Prejudice**

10 Finally, although counsel certainly could have done more with the ballistics evidence, the
11 Court does not find a reasonable probability that, but for counsel's failure to do so, the result of
12 the proceeding would have been different. *Strickland*, 466 U.S. at 694. It was not contested that
13 petitioner fired seven shots and that at least one directly hit Mackey. Mackey was walking to his
14 truck when he was shot from behind. RT at 77-79, 255, 294, 331. After he fell, he slid under his
15 truck. RT at 78-79, 139, 166. Mackey was not carrying a gun or any other weapon that would
16 have caused petitioner to believe that he needed to act in self-defense. RT at 75-76, 234-35.

17 Mackey was shot in his shoulder, femur, thigh, buttocks, and kneecap, and a bullet grazed
18 his calf. Several bullets went through his body, and others remained in his body. RT at 98-99,
19 293-96. He needed two surgeries and was scheduled for a third surgery at the time of trial. RT at
20 98-99, 297-98.

21 In the end, it was not surprising that many of the bullets first struck the ground given that
22 Mackey had taken shelter under his truck. Although several shots did not hit Mackey directly,
23 they were certainly aimed toward him and still caused serious injuries. That they may have hit the
24 pavement before injuring Mackey does not establish that it was petitioner's intent to strike only
25 the pavement. If petitioner had intended only to scare Mackey off, he could have easily done so
26 by firing one shot into the air. At some point, petitioner must have observed that the bullets were
27 hitting Mackey, and yet petitioner continued to shoot. Given the number and direction of the shots
28 alone, regardless of additional ballistics evidence and/or argument, a jury could reasonably

1 conclude that some shots simply missed Mackey as Mackey took shelter under his truck or even
2 that, having hit Mackey once, petitioner was less able to hit his mark as asphalt debris obscured
3 the target and as petitioner became concerned with fleeing the scene. In sum, additional focus on
4 the ballistics would not have necessarily undermined a finding of intent to kill. At a minimum, the
5 Court cannot say the state court was unreasonable in finding that petitioner was not prejudiced by
6 counsel's performance. *Richter*, 562 U.S. at 105.

7 Accordingly, petitioner is not entitled to habeas relief on his ineffective assistance of
8 counsel claims.

9 **IV. CONCLUSION**

10 For the reasons stated above, the petition for a writ of habeas corpus is DENIED.

11 Pursuant to Rule 11 of the Rules Governing Section 2254 Cases, a certificate of
12 appealability ("COA") under 28 U.S.C. § 2253(c) is GRANTED as to both claims. The Court
13 finds that reasonable jurists viewing the record could find the Court's assessment of the claims
14 "debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The COA does not obviate
15 the requirement that petitioner file a notice of appeal within **thirty (30)** days of this order.

16 The Clerk shall enter judgment in favor of respondent and close the file.

17 Additionally, the Clerk is directed to substitute Shawn Hatton on the docket as the
18 respondent in this action.

19 **IT IS SO ORDERED.**

20 Dated: October 3, 2018



21 JON S. TIGAR
22 United States District Judge

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